



Commonwealth of Massachusetts

State Ethics Commission

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Richard Penn
382 Ocean Avenue, Apt. 807
Revere, MA 02151

PUBLIC ENFORCEMENT LETTER 97-1

Dear Mr. Penn:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by participating as a member of the Revere City Council in matters in which Wonderland Greyhound Park, Inc., a private corporation of which you are an employee, had a financial interest. Based on the staff's inquiry (discussed below), the Commission voted on August 8, 1996, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §19. In view of certain mitigating circumstances, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. At all times relevant, you were a member of the Revere City Council. You were also an employee of Wonderland Greyhound Park, Inc. ("Wonderland").

2. Wonderland and Westwood Development, Inc. are wholly owned subsidiaries of Westwood Group, Inc. ("WGI"). WGI owned fifteen acres of land abutting Wonderland Greyhound Park. WGI had used the land to secure a \$3 million loan from U.S. Trust Company. In December 1983 WGI conveyed the property to Wonderland subject to U.S. Trust's mortgage, and Wonderland assumed WGI's note as a co-obligor. In May 1992 Westwood Development, Inc. used nine acres of the property to secure a \$4.5 million note from MSCGAF Realty Trust. Wonderland agreed to act as a guarantor of Westwood Development's \$4.5 million note. On April 15, 1993, Revere Realty Group, Inc. took title to lots 6, 7, & 8 of the parcel. Thus, Westwood Development owned nine acres of the original fifteen acres, while Revere Realty Group owned the remaining six acres.

3. On March 22, 1993, you sought advice from the Commission on whether you could participate in the Revere City Council's review of the special permit application submitted by the Revere Realty Trust. You disclosed that Revere Realty Trust was seeking to build a shopping center on land owned by the general manager for Wonderland and by Wonderland itself, and that you were an employee of Wonderland and a city councilor.

4. On April 12, 1993, the Commission's Legal Division issued an informal advisory opinion to you, which provided in pertinent part as follows:

Section 19 prohibits municipal employees from participating in particular matters in which they or their immediate family members or partners, or a business organization in which he is serving as officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. See, e.g.

EC-COI-89-19. The financial interest must be “direct and immediate, or at least reasonably foreseeable.” *EC-COI-84-123*; *84-98*; *86-25*; *84-96*.

Under §19, your employer’s financial interests are imputed to you. Since the [Wonderland Greyhound] Park has a financial interest in the special permit, you may not participate as a city councillor in that particular matter. Participation includes discussion and informal lobbying of colleagues, as well as voting (binding and non-binding). *EC-COI-92-30*. Under §19, if any financial interest is implicated, no matter how small, or whether the affect is positive or negative, participation is impermissible. *EC-COI-84-96*.

5. National Development Associates of New England (“National Development”), the developer of the fifteen acres, planned to build a 157,500 square-foot retail shopping complex on the property. On July 9, 1993, National Development submitted a special permit application to the Revere City Council to exceed the 10% retail use restriction for the zoning area encompassing the property.^{1/} National Development’s purchase and sale agreement was conditioned on the City’s issuance of the special permit. The permit application listed Revere Realty and Westwood Development as the owners of the affected land.

6. Pursuant to the advice received from the Commission, you attended but did not participate in an August 30, 1993 City Council public hearing on the special permit application.

7. Sometime in December 1993 City Council President Arthur Guinasso sought an advisory opinion from City Solicitor Richard Villiotte on the upcoming city council vote on the special permit application, which required a two-thirds majority of the city council (at least eight of the eleven councilors) to pass. Believing that at least four councilors had conflicts of interest as they or their family members were Wonderland employees, Guinasso sought Villiotte’s advice on invoking the Rule of Necessity to permit all eleven councilors to vote on the matter.^{2/}

8. Six councilors had no hint of a conflict of interest. At least four city councilors had apparent §23(b)(3) conflicts of interest in the matter, as their family members but not themselves were employees of Wonderland.^{3/} You were the only councilor with a §19 problem by virtue of your employment at Wonderland.^{4/}

9. Villiotte researched the Rule of Necessity and provided the city council with a written opinion on December 9, 1993. Relevant portions of that opinion provide:

It is my understanding that several city councilors may have a conflict of interest or have the appearance of a conflict because of their own employment or the employment of a member of their immediate family by Wonderland Greyhound Park, Inc. It is also my understanding that if all of the councilors who have a conflict of interest are disqualified from voting on the Wonderland Marketplace special permit, then the Council cannot act on said permit; because it will not have a sufficient number of councilors who can vote to constitute the two-thirds vote required (or conversely the four votes necessary to deny the special permit).

Villiotte suggested the following procedure: (1) all councilors who may be disqualified from voting advise the council president prior to the vote; (2) if the number of councilors disqualified is four or more, making an affirmative two-thirds vote impossible, the council president should invoke the Rule of Necessity; (3) all disqualified councilors would then be eligible to vote under the Rule of Necessity; and (4) the meeting minutes should clearly state that the Rule of Necessity was invoked due to the insufficient number of qualified councilors to reach a two-thirds vote.

10. Villiotte’s opinion was read into the record of the city council’s December 13, 1993 meeting. Thereafter, pursuant to Villiotte’s opinion, you and Councilors Tata, Singer and Santos-Rosa gave notice to Council President Guinasso of your “concerns relative to apparent conflicts of interest.” Guinasso then invoked the Rule of Necessity to enable all city councilors to vote on the matter.^{5/}

11. Eight city councilors voted in favor of the special permit application, including yourself, Guinasso, Santos-Rosa, Singer and Tata. One councilor voted in opposition to the permit, and two councilors voted present.

II. Discussion

As a member of the Revere City Council you are a municipal employee within the meaning of G.L. c. 268A, §1(g). As such, you are subject to the conflict of interest law, G.L. c. 268A, generally, and in particular, for the purposes of this discussion, to §19 of the statute.

Section 19 of G.L. c. 268A prohibits a municipal employee from participating^{6/} as a municipal employee in a particular matter^{7/} in which to his knowledge he or a business organization in which he serves as an employee has a financial interest.^{8/} While §19(b)(1) provides an exemption for appointed municipal employees, there is no exemption for elected employees.

The decision by the city council on the special permit application was a particular matter. As explained below, your employer had a financial interest in this particular matter.^{9/} You knew of this financial interest, as indicated by your seeking and receiving an informal advisory opinion from the Commission. Nevertheless, you participated as a city councilor in this particular matter on December 13, 1993, by voting on the special permit application. Therefore, it appears that you violated §19.

As stated above, you voted on the special permit matter only after the city council president invoked the Rule of Necessity in reliance on City Solicitor Villiotte's advice. In advising the city council, however, Villiotte did not appreciate that invoking the Rule of Necessity was not required if all of the conflicted councilors, except for you, cured their conflicts by filing §23(b)(3) disclosures. Villiotte believed "a conflict was a conflict" for purposes of applying the Rule of Necessity.

Nevertheless, resort to the Rule of Necessity was unnecessary because an adequate number of city councilors had no conflicts or could have cured their conflicts.^{10/} You were the only councilor with a §19 problem by virtue of your own employment at Wonderland. Your §19 conflict could not be cured. Thus, as you were the only councilor truly disqualified from voting, the Rule of Necessity was improperly invoked.

Reliance on a city solicitor's advice is a defense to a conflict of interest charge only if the opinion is in writing and has been submitted to and approved by the Commission. Had Villiotte submitted his opinion to the Commission, it would have been reviewed for accuracy. Because Villiotte did not submit his opinion, your §19 violation is mitigated but not excused by reliance on the city solicitor's faulty written advice. See *Public Enforcement Letter 87-4 (In the Matter of Walter Johnson)* (selectman violated §17 despite good faith reliance on erroneous town counsel opinion).

III. Disposition

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.^{11/}

This matter is now closed.

DATE: August 9, 1996

^{1/} Although your request for advice from the Commission disclosed that Revere Realty Trust was submitting a special permit application for developing the property, National Development actually submitted the application.

^{2/} The Commission has emphasized that the Rule of Necessity should be invoked only as a last resort when a board is unable to act on a matter because it lacks the number of members required to take a valid official vote, solely because members are disqualified from acting. *EC-COI-93-12; Commission Fact Sheet: Rule of Necessity*.

^{3/} Of the four city councilors with §23(b)(3) conflicts, two councilors were in fact qualified to vote. Councilor Tata's son was a maintenance worker at Wonderland who had no direct or reasonably foreseeable interest in the matter. Thus, Tata's conflict implicated only §23(b)(3). Tata had disclosed his conflict in writing to the city clerk, thereby curing his conflict and leaving him free to vote on the special permit. Councilor Santos-Rosa was also free to vote as she had no family member employed by Wonderland at the time and, therefore, no conflict.

^{4/} Generally, §19 does not prohibit public officials from participating in particular matters in which their family members' employers have a financial interest, although §19 may prohibit public officials from participating in those particular matters where, for example, a family member will be executing the contract for the employer. On the other hand, §23(b)(3) reaches conduct different than that addressed by §19.

Section 23(b)(3) forbids municipal employees from acting in a manner which would cause a reasonable person to conclude that the public official is likely to act or fail to act as a result of kinship. A reasonable person would conclude that city councilors with family members employed by Wonderland might vote for the special permit as a result of kinship.

^{5/} It appears that Guinasso also had a conflict as his wife and son-in-law were employees of Wonderland, although the December 13, 1993 city council minutes do not indicate that he disclosed his conflict at that meeting.

^{6/} “Participate” means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{7/} “Particular matter” means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{8/} “Financial interest” means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133, 345 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.

^{9/} First, the likelihood of Wonderland’s having to cover Westwood Development, Inc.’s \$4.5 million mortgage note, as a guarantor, was directly linked to Westwood Development, Inc.’s ability to pay its debts. Second, Westwood Development, Inc.’s (and Revere Realty Group, Inc.’s) ability to pay its debts was certainly affected by its sale of the property securing the note. Third, the sale of the property was conditioned on the city council’s issuance of the special permit. Therefore, Wonderland had a financial interest in this particular matter.

^{10/} The four city councilors with apparent §23(b)(3) conflicts of interest in the matter either had cured or could have cured their conflicts by a public disclosure. Thus, at least ten councilors were not disqualified from voting.

^{11/} The Commission is authorized to resolve violations of G.L. c. 268A with civil fines of up to \$2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than imposing a fine, after careful consideration of all the facts of this case, including: (i) your reliance upon the faulty written advice of the city solicitor; (ii) a Superior Court judge’s order annulling the city council’s December 13, 1993 vote (Civil Action No. 94-0154-E, Lauriat, J.); and (iii) the lack of evidence that you intentionally manipulated the city council’s invocation of the Rule of Necessity to enable you to vote. While none of these facts is by itself determinative, the combination of all of these factors, in the Commission’s view, made a public disposition without a fine appropriate.